

SOAH DOCKET NO. 582-06-0568
TCEQ DOCKET NO. 2005-1899-MWD

2007 JUN 15 PM 4:31

IN THE MATTER OF
THE APPLICATION OF
FAR HILLS UTILITY DISTRICT
FOR TPDES PERMIT NO. 14555-001

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BEFORE THE CHIEF CLERKS OFFICE
STATE OFFICE OF
ADMINISTRATIVE HEARINGS

**FAR HILLS UTILITY DISTRICT'S REPLY TO
CAPPS CONCERNED CITIZENS' RESPONSE TO
FAR HILLS UTILITY DISTRICT'S MOTION TO REOPEN THE RECORD**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY ("TCEQ"):

COMES NOW Far Hills Utility District ("Far Hills" or "the Applicant") and files this
reply to Capps Concerned Citizens' ("Capps") response to the Applicant's motion to reopen the
record of this case as filed on May 8, 2007.

**I. UNDER TEXAS WATER CODE §§11.502 AND 11.506,
THERE IS NO DISTINCTION BETWEEN
THE FEDERAL AND STATE DEFINITIONS OF "WETLANDS".**

Capps argues that the U.S. Army Corps of Engineers ("USACE") wetlands verification
which Far Hills seeks to be included in the evidentiary record is irrelevant because a USACE
wetlands verification deals only with U.S. jurisdictional wetlands whereas the term "wetlands"
for TCEQ purposes is more broadly defined than under federal law. As discussed in detail on
Far Hills' post-hearing briefing, Capps' legal position is flatly wrong. Under Texas state law
there is no distinction between "federal wetlands" and "state wetlands" and state law further
requires that TCEQ abide by federal determinations of wetlands.¹

The State Wetlands Act was enacted in 1989 as Subchapter J of Chapter 11 (Sections
11.501 – 11.506) of the Texas Water Code, a copy of which is attached hereto as Exhibit 1. That

¹ TEX. WATER CODE §§11.502 and 11.506 (Vernon 2000).

Act states that the definition of the term “wetlands” within the State of Texas **for purposes of the Federal Clean Water Act, six other named federal laws or programs, “and all Texas laws, rules, and regulations adopted...and interpretation and implementation of any kind whatsoever of both federal and state laws by agencies of the state, including any amendment or revision thereto, relating to wetlands,**

means an area (including a swamp, marsh, bog, prairie pothole, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation.”²

Because the State Wetlands Act requires all Texas state agencies to utilize the statutory definition for purposes of the Federal Clean Water Act and all Texas laws, rules and regulations, it is clear that in Texas “wetlands” must be defined the same under both federal and state law. If there was any room for doubt on this point, the Legislature removed any such doubt by expressly providing in Section 11.506 of the State Wetlands Act that: *“If the state definition conflicts with the federal definition in any manner, the federal definition prevails.”* Therefore, under the Texas state law, the term “wetlands” absolutely cannot have a broader meaning under state law than under federal law.

Capps acknowledges that Section 11.506 of the Texas Water Code requires TCEQ to employ a definition of “wetlands” that does not conflict with the federal definition, but goes on to pay lip service to Section 11.506 in stating that Capps wishes to apply a definition of wetlands that is the same as the federal definition “for all practical purposes.”³ Because Texas law requires that the federal definition of wetlands prevails over any other state law definition, the state definition cannot be broader than the federal definition. Capps cannot have it both ways by contending on the one hand that the state law definition is broader than the federal definition, and

² TEX. WATER CODE §11.502 (Vernon 2000).

³ Capps’ Response to Applicant’s Motion to Reopen the Record at page 4.

at the same time contending that the state and federal definitions are the same “for all practical purposes.”

Because the USACE is the primary federal agency for applying and interpreting federal laws concerning wetlands, an official USACE wetlands verification answers once and for all the question of whether or not wetlands exist on any piece of property in Texas. Accordingly, the USACE’s wetlands verification in this case is not only relevant, it is legally dispositive of the issue of whether wetlands exist on the piece of land Far Hills is proposing for locating its wastewater treatment units.

II. FAR HILLS WAS DILIGENT IN SEEKING AND OBTAINING THE USACE WETLANDS VERIFICATION.

Capps argues that Far Hills failed to act diligently to obtain the USACE wetlands verification for which Far Hills is requesting to supplement the record in this case. In making this argument Capps sanctimoniously lectures about Far Hills’ failure to have obtained the wetlands verification when it knew that the existence of wetlands was going to be an issue in this case. This completely distorts and misrepresents the facts about the nature of a USACE wetlands verification. Capps knows very well that a USACE wetlands verification is a regulatory determination which can only be sought after the completion of a wetlands delineation by a qualified wetlands expert. A USACE wetlands verification is a detailed critical review by USACE of a completed wetlands delineation which, once issued by USACE, amounts to an official determination by USACE of where wetlands exist within a defined study area. While there is no obligation to obtain a USACE wetlands verification, if a person wishes to obtain the official USACE wetlands determination, that person can submit a wetlands delineation to USACE for a verification. In this case, Far Hills chose to submit its wetlands delineation to USACE for an official verification immediately following the completion of Far Hills’ wetland

delineation performed by its wetlands expert, Nick Laskowski. In contrast, according to the testimony in this case, Capps' never chose to submit its wetlands delineation to USACE for a verification, and this may be explained by the fact that there are significant deficiencies in the methodology employed by Capps' wetlands expert in conducting his wetlands delineation for Capps.⁴

Mr. Laskowski completed his wetlands delineation in time to submit it for filing in this case by the deadline of May 4, 2006 as established by the ALJ for submission of Far Hills' wetlands delineation. And it was on May 3, 2006 that Mr. Laskowski submitted his completed wetlands delineation for official USACE verification. Thus, Far Hills' wetlands delineation was submitted for USACE verification immediately upon completion, which was the earliest possible point in time for doing so, and there was no delay whatsoever on Far Hills part in seeking the USACE verification. Yet Capps makes repeated statements castigating Far Hills for not seeking the USACE verification at some earlier point in time, as if seeking a USACE wetlands verification is something that can occur prior to completing a wetlands delineation. Obviously, until a wetlands delineation is performed, there can be nothing for USACE to verify.

Furthermore, in arguing that Far Hills was not diligent in seeking a USACE wetlands verification, Capps makes the misleading statement that "nine months after submission of the application, Applicant knew the [USACE] believed jurisdictional wetlands exist on-site, and Applicant knew that the site was subject to frequent inundation." Capps is referring to a USACE letter to Capps member Jonell Nixon dated January 11, 2005 in response to her request for a USACE wetlands determination. In response, USACE performed a "desk review" and made an on-site evaluation of two data points only one of which was determined to exhibit wetlands

⁴ These deficiencies are discussed in Far Hills' Exceptions to the ALJ's Proposal for Decision at pages 23 – 25.

characteristics and that data point was “located immediately south of the pond levee located on the northern boundary of the property” which is a point far to the north of where Far Hills proposes to locate its wastewater treatment units.⁵ Capps statement that the site is “subject to frequent inundation” is equally misleading since there is no support in the record for such statement; indeed, the record shows that none of the study area even lies within the FEMA-mapped 100-year floodplain.⁶

Far Hills’ request to receive the USACE wetlands verification into the record of this case is not based on any lack of diligence on Far Hills’ part in failing to have obtained the USACE verification at an earlier point in time since issuance of the USACE verification could not and did not occur until the normal USACE processes for issuing such wetlands verifications could take place.

III. ADMISSION OF THE ADDITIONAL EVIDENCE WILL NOT CAUSE AN UNDUE DELAY.

The admission of the two requested documents need not at all result in additional or undue delay. At TCEQ agenda, the Commissioners normally have a SOAH ALJ standing by in order to quickly convene a hearing for some limited purpose. At such a hearing, Far Hills would offer the two documents into evidence and the other parties would have an opportunity to cross-examine the sponsoring witnesses about the documents. The entire limited-purpose hearing could be completed in one to two hours.

Interestingly, in the section of its response dealing with this issue, Capps explicitly acknowledges the primary underlying reason for its opposition to the Far Hills permit: to protect the private property rights of Roy Zboyan who is using this permit proceeding as a means of

⁵ See Far Hills’ Exhibits NL-3 and NL-4 (Bates pages A00911 – A00921).

⁶ Hearing Transcript, pg. 256 (lines 6-12).

avoiding an adverse court decision in a condemnation action concerning the proposed location of Far Hills' wastewater plant.

**IV. ADMISSION OF THE ADDITIONAL EVIDENCE
WILL NOT CAUSE AN INJUSTICE.**

The admission of the two requested documents need not result in any injustice to Capps or any other party. As an "injustice" Capps again charges that Far Hills should not be allowed to introduce additional evidence after the time for filing its case has passed since this would "encourage all applicants for permits from TCEQ to submit applications, and evidence, they know to be insufficient and only put forth the effort to present a case if they later find that their initial effort was inadequate." But this is a nonsensical argument since it ignores the fact that this evidence did not even come into existence until well after the evidentiary record in the case was closed.

Capps also cites the time delays and associated costs that will result from admission of the new evidence. But as stated above, the new evidence can be received into the record in a limited purpose hearing lasting but one or two hours which does not amount to any injustice to Capps, especially considering the lengthy period of time experienced to date in getting the case to TCEQ agenda consideration. There is certainly nothing in the TCEQ rule at 30 TAC §80.265 concerning reopening of the record that countenances the payment of opposing parties' costs as requested by Capps.

**V. ADMISSION OF THE DECEMBER 21, 2006 LETTER FROM MCUD NO. 2
RESOLVES THE AMBIGUITY IN THE MCUD NO. 2
QUESTIONNAIRE RESPONSE OF SEPTEMBER 17, 2004.**

Capps makes the red herring argument that Far Hills' delay in submitting MCUD No. 2's response to Far Hills' request for service somehow adversely affected TCEQ's ability to consider MCUD No. 2 as a regional provider. The facts are that MCUD No. 2 did not provide its

response to Far Hills' request for service in time for Far Hills to include it with the application. MCUD No. 2 finally did respond, in an ambiguous manner, on September 17, 2004. MCUD No. 2's answer was ambiguous because MCUD No. 2 stated that it would be agreeable to expanding its facility to accept Far Hills' proposed volume of wastewater, but it would need to further evaluate this option. When Far Hills discovered in depositions of TCEQ staff on April 11, 2006 that TCEQ staff had not seen MCUD No. 2's response of September 17, 2004, Far Hills immediately provided TCEQ staff with that document. But MCUD No. 2's response of September 17, 2004 was hardly a critical document for evaluating MCUD No. 2's potential as a regional wastewater service provider. The issue of whether MCUD No. 2 was willing and able to accept and handle Far Hills' proposed volume of wastewater was litigated extensively in the hearing and a deposition of MCUD No. 2's president was even taken to explore this issue in detail. Therefore, Far Hills' inadvertent failure to submit MCUD No. 2's cryptic response of September 17, 2004 to TCEQ staff until April of 2006 was completely harmless.

As described in Far Hills' briefing, the evidence conclusively showed that MCUD No. 2 was neither willing nor able to take Far Hills' wastewater.⁷ Ignoring this clear and overwhelming evidence, the ALJ inexplicably found that there was no need for Far Hills' wastewater plant because MCUD No. 2 had the ability and willingness to serve Far Hills. Apparently so surprised was MCUD No. 2 at this finding by the ALJ, that MCUD No. 2 took it upon itself to submit to TCEQ its letter of December 21, 2006 clearly stating that while at one time it may have been willing to consider expanding its plant to serve Far Hills, "*such course of action is no longer practical*"; that "*the existing site for the plant is not adequate in size for an expansion*"; and that to expand its plant to serve Far Hills "*would be prohibitively expensive at*

⁷ See Far Hills' Exceptions to ALJ's Proposal for Decision at pages 1 - 9.

this point in time and not in the best interests of its constituents.” Furthermore, according to MCUD No. 2’s letter, expansion of the MCUD No. 2 plant to serve Far Hills would be harmful from an environmental point of view because doubling or tripling the discharge from MCUD No. 2’s discharge point into a small cove of Lake Conroe simply *“is not wise.”*

Therefore, the value of receiving the MCUD No. 2 letter of December 21, 2006 into evidence is to clarify whatever ambiguity may have been created by its earlier response of September 17, 2004. Far Hills’ inadvertent failure to submit MCUD No. 2’s questionnaire response of September 17, 2004 to TCEQ staff did nothing to impede TCEQ’s consideration of MCUD No. 2’s ability to act as a regional provider for Far Hills. That brief and ambiguous questionnaire response was irrelevant since the issue addressed in it was litigated extensively in this case. If anything, MCUD No. 2’s ambiguous response only confused the issue. MCUD No. 2’s letter of December 21, 2006 is needed in order to clarify that confusion, although no such clarification should be needed since the existing evidentiary record clearly demonstrates MCUD No. 2’s inability and unwillingness to handle Far Hills’ proposed volume of wastewater.

**VI. THIS CASE SHOULD NOT BE REMANDED TO SOAH
FOR FURTHER PROCEEDINGS ON OTHER ISSUES.**

Notwithstanding its stated desire to avoid further delays in this case, Capps requests that this case be remanded to SOAH to develop findings of fact and conclusions of law on a list eight other substantive issues. In view of the unseemly delays already experienced in getting this case to TCEQ agenda, Far Hills strenuously objects to a SOAH remand to address additional substantive issues. If findings of fact are needed on such other issues, the TCEQ Commissioners can make such findings based on the existing evidentiary record and briefing of the parties.

The delay experienced to date in obtaining a TCEQ decision on its permit has created a dire situation in which Far Hills cannot begin to construct the wastewater plant which its

customers so badly need and Far Hills cannot rely on the limited capacity available at MCUD No. 2. For TCEQ to further delay this case to hold additional hearings would work a severe injustice on Far Hills and its customers. The wastewater treatment plant is needed by Far Hills and its customers now more than ever. It has now been 12 months since the hearing in this case at which Far Hills demonstrated compliance with every aspect of TCEQ's permitting requirements. The ALJ's recommendation on the issues of MCUD No. 2's ability to serve Far Hills and the existence of wetlands on the proposed site are simply not supported by the facts of this case. Far Hills implores TCEQ to set this case for agenda consideration and issue the permit.

VII. CONCLUSION AND PRAYER

For the reasons set forth above, Far Hills Utility District respectfully requests that the record in this case be reopened to receive the documents attached as Exhibits "A" and "B" to its Motion to Reopen the Record, and for such other relief to which Far Hills may be justly entitled.

Respectfully submitted,

KELLY HART & HALLMAN LLP

Stephen C. Dickman

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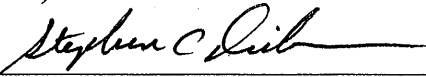
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CERTIFICATE OF SERVICE

This is to certify that on this the 15th day of June, 2007, a true and correct copy of the foregoing document was forwarded to the following persons in accordance with TCEQ and SOAH rules by the means indicated:

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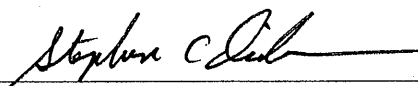

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EXHIBIT 1

SUBCHAPTER J. WETLANDS

§ 11.501. Title of Act

This Act shall be known and may be cited as the "Wetlands Act."

Added by Acts 1989, 71st Leg., ch. 1202, § 1, eff. Aug. 28, 1989.

§ 11.502. Definition

(1) The definition of the term "wetlands" within the State of Texas, for purposes of the Clean Water Act, 33 U.S.C. 1311, 1344; the Erodible Land and Wetland Conservation and Reserve Program, 16 U.S.C. 3801-3845; the Emergency Wetlands Resources Act of 1986, 16 U.S.C. 3901-3932; the National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370a, all statutory foundation for the Federal Wildlife Service's National Wetlands Inventory mapping, including the Water Bank Program for Wetlands Preservation, 16 U.S.C. 1301-1311; the Water Resources development project (wetland areas), 42 U.S.C. 1962d-5e; and the Migratory Bird Conservation Act, 16 U.S.C. 715-715r; and all Texas laws, rules, and regulations adopted pursuant to Chapter 2001, Government Code and interpretation and implementation of any kind whatsoever of both federal and state laws by agencies of the state, including any amendment or revision thereto, relating to wetlands, means an area (including a swamp, marsh, bog, prairie pothole, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation.

(2) The term "hydric soil" means soil that, in its undrained condition, is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation.

(3) The term "hydrophytic vegetation" means a plant growing in: water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content.

(4) The term "wetlands" does not include:

- (A) irrigated acreage used as farmland;
- (B) man-made wetlands of less than one acre; or

(C) man-made wetlands not constructed with wetland creation as a stated objective, including but not limited to impoundments made for the purpose of soil and water conservation which have been approved or requested by soil and water conservation districts.

Added by Acts 1989, 71st Leg., ch. 1202, § 1, eff. Aug. 28, 1989. Amended by Acts 1995, 74th Leg., ch. 76, § 5.95(49), eff. Sept. 1, 1995.

§ 11.502

WATER ADMINISTRATION Title 2

Historical and Statutory Notes

The 1995 amendment, in subd. (1), substituted "Chapter 2001, Government Code" for "the Administrative Procedure and Texas Register

Act (Article 6252-13a, Vernon's Texas Civil Statutes)".

Cross References

State-owned coastal wetlands, definition of "wetlands" in conservation plan as consistent with the definition under this subchapter, see V.T.C.A., Parks & Wildlife Code § 14.002.
"Wetlands", under Coastal Public Lands Management Act, to have meaning assigned under this subchapter, see V.T.C.A., Natural Resources Code § 33.233.

Library References

Health and Environment ⇌ 25.5-25.7.
Navigable Waters ⇌ 38.
WESTLAW Topic Nos. 199, 270.

C.J.S. Health and Environment § 61 et seq.
C.J.S. Navigable Waters §§ 113-114.

§ 11.503. Applicability to Man-Made Wetlands

Section 11.502(4)(C) applies only to man-made wetlands, the construction or creation of which commences on or after the effective date of this Act.

Added by Acts 1989, 71st Leg., ch. 1202, § 1, eff. Aug. 28, 1989.

Library References

Health and Environment ⇌ 25.5-25.7.
Navigable Waters ⇌ 38.
WESTLAW Topic Nos. 199, 270.

C.J.S. Health and Environment § 61 et seq.
C.J.S. Navigable Waters §§ 113-114.

§ 11.504. Applicability to Surface Mining and Reclamation ¹

This Act shall not apply to surface mining and reclamation.

Added by Acts 1989, 71st Leg., ch. 1202, § 1, eff. Aug. 28, 1989.

¹ Section heading editorially supplied.

Library References

Health and Environment ⇌ 25.5-25.7.
Mines and Minerals ⇌ 92.8-92.11.
Navigable Waters ⇌ 38.

WESTLAW Topic Nos. 199, 260, 270.
C.J.S. Health and Environment § 61 et seq.
C.J.S. Navigable Waters §§ 113-114.

§ 11.505. Applicability to State Revolving Loan Fund Program ¹

This Act shall not apply to the state revolving loan fund program.

Added by Acts 1989, 71st Leg., ch. 1202, § 1, eff. Aug. 28, 1989.

¹ Section heading editorially supplied.

WATER RIGHTS
Ch. 11

§ 11.506


§ 11.506. Conflict Between State and Federal Definitions¹

If the state definition conflicts with the federal definition in any manner, the federal definition prevails.

Added by Acts 1989, 71st Leg., ch. 1202, § 1, eff. Aug. 28, 1989.

¹ Section heading editorially supplied.

Library References

States  18.31, 18.91.
WESTLAW Topic No. 360.
C.J.S. States § 24.